In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 142

GENERAL AGGREGATES CORPORATION, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 110-126)[1] are unreported. The opinion of the court of appeals (Pet. 14-20) is reported at 313 F. 2d 25.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 1963. (Pet. 21.) A petition

[1] Record references are to the record appendix to the taxpayer's brief in the court of appeals.

for rehearing was denied on February 19, 1963. (Pet. 2.) The petition for a writ of certiorari was filed on May 18, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the courts below correctly sustained the Commissioner's determination that certain funds received by the taxpayer from another corporation in which it was a stockholder should be treated as dividends and not as loans.

STATUTE AND REGULATIONS

Internal Revenue Code of 1939 (26 U.S.C., 1952 ed.):

SEC. 115. DISTRIBUTIONS BY CORPORATIONS.

(a) [as amended by the Act of June 25, 1947 (P.L. 113), c. 144, 61 Stat. 179] *Definition of Dividend.*—The term "dividend" when used in this chapter * * * means any distribution made by a corporation to its shareholders, whether in money or in other property, (1) out of its earnings or profits accumulated after February 28, 1913, or (2) out of the earnings or profits of the taxable year (computed as of the close of the taxable year without diminution by reason of any distributions made during the taxable year), without regard to the amount of the earnings and profits at the time the distribution was made. In the case of a corporation which, under the law applicable to the taxable year

in which the distribution is made, is a personal holding company, * * * such term also means any distribution (whether or not a dividend as defined in the preceding sentence) to its shareholders, whether in money or in other property, to the extent of its subchapter A net income, * * *

* * * * *

SEC. 500. SURTAX ON PERSONAL HOLDING COMPANIES [as amended by Sec. 181 of the Revenue Act of 1942, c. 619, 56 Stat. 798].

There shall be levied, collected, and paid, for each taxable year beginning after December 31, 1938, upon the undistributed subchapter A net income of every personal holding company (in addition to the taxes imposed by chapter 1) a surtax equal to the sum of the following:

(1) 75 per centum of the amount thereof not in excess of $2,000; plus

(2) 85 per centum of the amount thereof in excess of $2,000.

SEC. 501. DEFINITION OF PERSONAL HOLDING COMPANY.

(a) *General Rule.*—For the purposes of this subchapter and chapter 1, the term "personal holding company" means any corporation if—

(1) *Gross income requirement.*—At least 80 per centum of its gross income for the taxable year is personal holding company income as defined in section 502 * * *

(2) *Stock ownership requirement.* — At any time during the last half of the taxable year more than 50 per centum in value

of its outstanding stock is owned, directly or indirectly, by or for not more than five individuals.

* * * *

SEC. 502. PERSONAL HOLDING COMPANY INCOME.

For the purposes of this subchapter the term "personal holding company income" means the portion of the gross income which consists of:

(a) Dividends, interest (other than interest constituting rent as defined in subsection (g)), royalties (other than mineral, oil, or gas royalties), annuities.

* * * *

Treasury Regulations 118 (1939 Code):

SEC. 39.502-1 *Personal holding company income.* The term "personal holding company income" means the portion of the gross income which consists of the following:

(a) *Dividends.* The term "dividends" includes dividends as defined in section 115(a), * * *

* * * *

STATEMENT

Taxpayer, General Aggregates Corporation, is a Massachusetts corporation. In the taxable years 1951 and 1952 it was concededly a personal holding company dominated by one George S. Wilbur (now deceased) who with members of his family owned and controlled more than 50 per centum in value of the outstanding stock of the company. The Wilbur fami-

ly also dominated another Massachusetts corporation, Highland Sand and Gravel Company, Inc. (hereinafter called Highland), and taxpayer owned all of the Class B (common) stock of that company. (R. 111-112; Pet. 5, 14-15.)

Highland had $311,000 [2] in earnings and profits at the end of 1951 and $293,000 at the end of 1952. From 1932 to 1952, inclusive, Highland paid no formal dividends to its stockholders. (R. 119-120; Pet. 15.)

In 1950 Wilbur decided to establish a restaurant and in 1951 he organized a corporation, Chateau Montserrat, Inc. (hereafter called Chateau), to conduct the business. Taxpayer owned and paid for one-half of Chateau's stock and on the books of Chateau Wilbur's secretary was shown as owner of the other one-half. (R. 112-113; Pet. 15-16.)

In order to provide funds to establish the restaurant as a going business, various amounts were paid by Highland to taxpayer and Wilbur in 1951 and 1952, which they used for this restaurant project. In this connection, Highland paid a total of $126,000 ($98,000 to taxpayer and $28,000 to Wilbur) of which $89,000 was paid in 1951 and $37,000 in 1952. (R. 122; Pet. 5, 16.)

The Commissioner of Internal Revenue determined that these amounts of $89,000 and $37,000, ostensibly representing loans, constituted income from dividends within the scope of § 115(a) of the Internal

[2] Round amounts are used for convenience.

Revenue Code of 1939;[3] and that taxpayer met the stock ownership and income requirements of § 501 (a) of the Code in each of the years and was, accordingly, liable under § 500 for the surtax on personal holding companies. (R. 9, 121.)

The Tax Court sustained the Commissioner and held that the payments were dividends and not loans to taxpayer. (R. 126.) The court of appeals affirmed as to the payments made directly to taxpayer, but reversed as to the payments initially made to Wilbur. (Pet. 18-20.)

ARGUMENT

The decision below is correct and none of the four grounds for certiorari advanced by petitioner warrants further review by this Court.

1. The assertion of a conflict with *Frelbro Corp. v. Commissioner*, 315 F. 2d 784 (C.A. 2) (Pet. 6-8), is unsupportable. The court there held that a simultaneous exchange of checks between a parent and subsidiary was a dividend from the subsidiary to the parent only of the difference between the two checks, a decision having no parallel here. In so holding, the court observed that the heavy personal holding company surtax that turned upon its resolution of the question made it "particularly important" that the "substance of the transaction rather than its form" be looked to (315 F. 2d at 784). The conflict

[3] It was the Commissioner's position with regard to the sums paid to Wilbur that they were constructive dividends to taxpayer inasmuch as they were invested in Chateau in which taxpayer owned stock but Wilbur did not.

claimed is that the court below did not similarly note its awareness of the "particular importance", because of the heavy surtax, of looking to substance rather than form. Whether the omission reflects a difference of attitude or only of writing style need not be debated; in neither event does it rise to a conflict of principle, much less to a conflict of decisions.

2. On its claim that the burden of proof should be on the Commissioner in personal holding company cases (Pet. 8-9), petitioner alleges no conflict. And in the absence of a special statute shifting the burden (*e.g.*, as on the issue of fraud, § 1112 of the 1939 Code), there is no basis for a different rule in such cases.

3. The court of appeals upheld the Commissioner's determination that the amounts paid by Highland directly to petitioner were dividends to it but held that the amounts paid to Wilbur were not. Petitioner claims that the Commissioner's error in characterizing Wilbur's receipts shifts the burden of proof to the Commissioner as to the character of petitioner's receipts (Pet. 9-11). The cases cited as being in conflict, whatever their merits, involve only the burden of proving the amount of a receipt or expenditure after the Commissioner's determination as to that item has been shown erroneous; they in no way suggest that an error as to the treatment of one item (Wilbur's receipts) shifts the burden of proof on another (petitioner's receipts).

4. The Tax Court based its characterization of the payments from Highland to petitioner as dividends

rather than loans on its finding that the parties (in reality, Wilbur, the controlling figure in both corporations) did not intend that they be repaid (R. 122-126). That finding of fact, amply supported by the evidence, was properly affirmed by the court of appeals as not being plainly wrong (Pet. 17, 18-19). Whatever the language in *Spheeris* v. *Commissioner*, 284 F. 2d 928 (C.A. 7), certiorari denied, 366 U.S. 944, referring to "mixed questions of law and fact" may imply as to the proper scope of review in such cases, the court there likewise affirmed the trial court's conclusion that the payments involved were dividends rather than loans, and the decision accordingly cannot be in conflict (see Pet. 11) with the decision below.

CONCLUSION

For the reasons stated, the petition for certiorari should be denied.

Respectfully submitted.

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